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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2768/2016*, **

Communication submitted by:	Z.B. (represented by counsel, Gruša Matevžič of the Hungarian Helsinki Committee)
Alleged victims:	The author
State party:	Hungary
Date of communication:	23 May 2016 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure transmitted to the State party on 25 May 2016 (not issued in document form)
Date of adoption of decision:	19 July 2018
Subject matter:	Deportation to Serbia
Procedural issue:	Victim status
Substantive issues:	Risk of torture, cruel, inhuman or degrading treatment or punishment; non-refoulement; right to an effective remedy
Articles of the Covenant:	2 (3) (a), 7 and 13
Article of the Optional Protocol:	2

1.1 The author of the communication is Z.B., born on 2 February 1982. She is a Cameroonian and South Sudanese national seeking asylum in Hungary and subject to deportation to Serbia following the rejection of her application for refugee status in Hungary by the Hungarian authorities. She claims that by forcibly deporting her to Serbia, Hungary would violate her rights under article 7, read alone and in conjunction with article 2 (3) (a), and article 13 of the Covenant. The author is represented by the Hungarian Helsinki Committee. The Optional Protocol entered into force for Hungary on 7 September 1988.

1.2 On 25 May 2016, pursuant to rule 92 of the Committee's rules of procedure, the Special Rapporteur on new communications and interim measures requested the State party

* Adopted by the Committee at its 123rd session (2–27 July 2018).

** The following members of the Committee participated in the examination of the present communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

to refrain from deporting the author to Serbia while her case was under consideration by the Committee.

The facts as submitted by the author

2.1 The author was born in Cameroon. She resided in Douala, Cameroon, with her son and her sister. On 8 February 2015, while the author and her son were away, unidentified persons broke into her apartment and severely beat her sister.[1] The attack was motivated by her sister's homosexuality. Homosexuality is illegal in Cameroon. Following the attack, the Cameroonian authorities issued an arrest warrant for the author and her sister, accusing the author of facilitating homosexuality.[2] The author therefore fled with her son and her sister to northern Cameroon.

2.2 Soon afterwards, the arrest warrant was extended to the whole territory of the country. The author therefore fled in June 2015, to Yambio, South Sudan, together with her son and sister, to live with her father and half-brother. South Sudan was in a state of civil war at that time. One night in November 2015, a group of around 30 armed men broke into the author's father's house and forced the author and her father, and her half-brother and her sister respectively, to engage in sexual acts. They then killed all the men and boys present, including the author's 10-year-old son. Following the attack, Mr. B., a friend of the author's father, offered to help the author and her sister to flee to Europe.

2.3 At an unknown date, the author and her sister flew to Istanbul, Turkey, accompanied by Mr. B. At the airport, Mr. B took their possessions and left, promising to return. Instead, two strangers took them to a van with around 10 other people. Two weeks later, the author and her sister were blindfolded and forced into a van with many other occupants.[3] They travelled during the night and were not told of their destination, but the next morning they arrived in Belgrade. The traffickers kept the author and her sister captive in a house for at least one month, until February 2016. During that time, the traffickers raped them and forced them into prostitution.

2.4 During a night of February 2016, the traffickers abandoned the author, her sister and several other captives in a forest close to the Hungarian border, informing them that they were already in Hungary, although in fact they were still in Serbia. On 23 February 2016, after walking in the direction indicated by the traffickers, the author and her sister entered Hungary through holes in the border fence. They were caught by the police and brought to the Border Control field office in Szeged, where they submitted an asylum application. On 24 February 2016, they were placed in the Bicske refugee reception centre.

2.5 On 11 April 2016, the Office of Immigration and Nationality conducted the author's first and only interview. A French-speaking interpreter was present. However, at the end of the interview, the interviewer did not read the minutes back to the author and she was not therefore able to correct the errors.[4] On 13 April 2016, legal advisers from the Hungarian Helsinki Committee met with the author and provided her with the translated minutes of her interview. The author and the legal advisers noted the errors and drafted a document that the author submitted to the Office of Immigration and Nationality.

2.6 On 15 April 2016, the Office of Immigration and Nationality declared the author's application inadmissible under section 51 (2) (e) of Act LXXX of 2007 on Asylum (Asylum Act), on the grounds that she had arrived through Serbia, which was considered a safe third country. The author alleges that the Office of Immigration and Nationality did not give any consideration to the document prepared by the Helsinki Committee.[5] The decision

[1] As a consequence of the attack, the author's sister had to undergo surgery to have her ovaries removed.

[2] The Committee has no information as to the date of the arrest warrant.

[3] The Committee has no information as to what happened during those two weeks.

[4] The author alleges that, for example, the minutes incorrectly recorded that she was lesbian, like her sister, and that this was her reason for leaving Cameroon.

[5] The author provides the original decision in Hungarian and an unofficial translation. The decision makes no reference to the Helsinki Committee document, but repeats some of the errors from the asylum interview that were clarified in the Helsinki Committee document.

cited information about Serbia and referred to the constitutional protection of the right to asylum in Serbia and its ratification of a number of international human rights treaties guaranteeing that right, as well as the fact that Serbia had an asylum law which came into force in 2008 and a legal framework for making decisions and revising them. However, in its decision the Office of Immigration and Nationality did not take into consideration whether access to asylum in Serbia was guaranteed in practice and made no mention of the sexual abuse the author had suffered in Serbia. Nor did they evaluate the information she had provided on the atrocities committed against her and her sister in Belgrade, or take into account the fact that they were victims of human trafficking. On that basis, the Office of Immigration and Nationality mistakenly concluded that the author had had the opportunity to apply for asylum in Serbia, ordered her expulsion and issued a two-year entry ban.

2.7 The decision of the Office of Immigration and Nationality was communicated to the author on 20 April 2016. She submitted an appeal to the Administrative and Labour Court of Budapest and requested a personal hearing.[6] On 26 April 2016, the author's counsel sent an urgent submission to the court via the Office of Immigration and Nationality.[7] The counsel argued that Serbia could not be considered a safe third country for the author; that the individual assessment concerning refoulement to Serbia had not been carried out with due care; that the author's statements on her captivity and rape in Serbia had not triggered a special investigation, given that she was particularly vulnerable; that no medical expert had been ordered to examine her; and that the Office of Immigration and Nationality had not presented any evidence that Serbia was a safe country for the author or given her an opportunity to comment in that regard.

2.8 The Office of Immigration and Nationality claimed to have received the submission on 29 April 2016 and, despite the urgency, it forwarded it to the court only on 2 May 2016. The author's counsel called the court on 2 and 3 May 2016 to inquire whether the submission had been received, but was informed that the submission had not arrived and that the case had not yet been registered. On 4 May 2016, counsel called again and was informed that a case number had been assigned to the case on 3 May in the afternoon and that the court had already decided the case. The decision is dated 3 May 2016, demonstrating that the court did not duly examine her submission. The judge did not mention that the author was represented in the proceedings.

2.9 In its decision of 3 May 2016, the Budapest Administrative and Labour Court rejected the author's appeal and confirmed the decision of the Office of Immigration and Nationality, stating that the author had not presented any new facts concerning the legal questions arising from her case. The court did not therefore find it necessary to hear her in person. The court also stated that the author had not presented facts explaining why Serbia would not be a safe country for her[8] and noted that the author had had the chance to apply for asylum in Serbia and invoke effective protection, but had not done so. The court concluded that the information on Serbia indicated that asylum could be granted there. It further stated that "according to section 2 of government decree 191/2015 (VII.21) on safe countries of origin and safe third countries, Serbia, as an acknowledged candidate state to join the European Union, is a safe third country. The decree establishes a presumption (*praesumptio iuris*) concerning the safety of Serbia. The Office of Immigration and Nationality communicated this fact to the applicant in the asylum procedure, yet she presented no facts explaining why Serbia would not be a safe country for her."

2.10 The author submits that, according to section 53 (5) of the Asylum Act, decisions by the Budapest Administrative and Labour Court in judicial review procedures on asylum issues cannot be appealed, and she has thus exhausted all domestic remedies.

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[6] According to section 53 (3) and (4) of the Asylum Act, an asylum seeker has seven days to appeal and the court has to decide the case in eight days. A personal hearing is not mandatory.

[7] According to section 53 (3) of the Asylum Act, the request for review must be submitted to the refugee authority within seven days of the communication of the decision. The refugee authority must then forward the request for review, together with the documents of the case and its counter-application, to the court without delay.

[8] The author claims that she did mention in the interview with the Office of Immigration and Nationality that she was held in captivity in Serbia, forced into prostitution and raped several times.

The complaint

3.1 The author claims that her deportation to Serbia would expose her to a violation of article 7 of the Covenant. Referring to the Committee's general comments No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment and No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, the author submits that a State party may violate the Covenant when it is foreseeable that its decision on a person within its jurisdiction may be violating that person's rights in another jurisdiction.[9] The Committee has also indicated that the risk must be personal and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the applicant's country of removal.[10] There are substantial grounds for believing that the removal of the author to Serbia would create a real risk of irreparable harm amounting to inhuman or degrading treatment.

3.2 The author refers to the jurisprudence of the European Court of Human Rights in *Budina v. Russia*, according to which the inaction of a State party in the face of severe conditions within their jurisdiction may amount to inhuman or degrading treatment.[11] She also refers to the case of *M.S.S. v. Belgium and Greece*, in which the Court held that inappropriate reception conditions and serious shortcomings in asylum procedures amounted to inhuman and degrading treatment.[12]

3.3 The author then points to the multiple deficiencies of the Serbian asylum system that have been consistently recorded over the past years in publicly available reports of national and international organizations, including the non-registration of asylum applications, routine pushbacks, delays, lack of procedural safeguards during the asylum procedure and failure to identify vulnerable applicants.[13]

3.4 Persons returned to Serbia are in practice barred from accessing the asylum procedure and reception facilities. They are rather prosecuted for irregular border crossing, which is a criminal offence punishable by a fine or imprisonment. In practice, most persons are only issued with a warning; however, the court decision is accompanied by a decision of the Ministry of the Interior which terminates the asylum seekers' right to stay on Serbian territory. Following that decision, asylum seekers are not allowed to stay in one of the refugee camps in the country and, for want of a registered residence, cannot formally lodge an asylum application in Serbia.[14]

3.5 In addition, there is a lack of capacity leading to a reception crisis owing to the sharp increase of migrant arrivals in Serbia. The number of migrants entering Serbia, along with issues of mismanagement at asylum reception centres, which may deny people with certificates of entry,[15] has led to many asylum seekers being forced to sleep rough in

[9] See *Kindler v. Canada*, (CCPR/C/48/D/470/1991).

[10] See *X. v. Sweden* (CCPR/C/103/D/1833/2008), para. 5.18.

[11] European Court of Human Rights, *Budina v. Russia* (dec.), Case No. 45603/05, decision of inadmissibility adopted on 18 June 2009.

[12] European Court of Human Rights, *M.S.S. v. Belgium and Greece* Case No. 30696/09, Judgment, 21 January 2011.

[13] The author refers to Hungarian Helsinki Committee, "Serbia as a safe third country: revisited" (June 2012); Commissioner for Human Rights of the Council of Europe, "Serbia should end degrading reception conditions for asylum seekers", 12 December 2013; Belgrade Centre for Human Rights, "Right to asylum in the Republic of Serbia, 2014" (March 2015); Amnesty International, "Europe's borderlands: violations against refugees and migrants in Macedonia, Serbia and Hungary" (July 2015); and Human Rights Watch, "Serbia: police abusing migrants, asylum seekers: beaten, extorted, shoved back across the border", 15 April 2015. The author also mentions that the main shortcomings of the Serbian asylum system are comprehensively presented in a document published on 12 October 2015 by the European Legal Network on Asylum and the European Database of Asylum Law, entitled "Desk research on the procedural and reception system for asylum seekers in Serbia".

[14] See European Council for Refugees and Exiles, "Crossing boundaries: the new asylum procedure at the border and restrictions to accessing protection in Hungary" (October 2015).

[15] The author mentions that once an individual has entered Serbian territory, in order to access the asylum process, he or she must register his or her intention of seeking asylum with the border police

surrounding woodland or abandoned buildings in harsh weather, which amounts to inhuman and degrading treatment.[16] Moreover, refugees are often victims of police brutality, forced to pay bribes, are verbally and physically abused, and are denied access to Serbian territory.[17]

3.6 The author also alleges that if returned to Serbia, she would be exposed to chain refoulement. She refers to numerous consistent and credible reports of routine pushbacks of asylum seekers to the former Yugoslav Republic of Macedonia without any consideration of their individual situation or the opportunity to claim asylum.[18] Article 33 of the Serbian Asylum Act incorporates the "safe third country" concept, whereby an application may be dismissed without reviewing the merits, unless the asylum seeker can prove that the country is not safe for him or her. That concept is applied systematically, as the list of safe third countries, which has not been updated since 2009, includes all States bordering Serbia and nearly all States that applicants must transit through in order to reach Serbia (including Greece, the former Yugoslav Republic of Macedonia[19] and Turkey). It is not based on criteria that establish whether the third country provides a fair and efficient asylum procedure and the availability of effective protection is not examined. She therefore risks being deported to the former Yugoslav Republic of Macedonia and then to Greece, without a substantive examination of her application. The systemic deficiencies in the Greek asylum system will put her at risk of chain deportation, violating the principle of non-refoulement. Ultimately, she is likely to end up in her country of origin, where she faces persecution.

3.7 Several international organizations have expressed their concern about the asylum procedure in Serbia and human rights violations. For example, in May 2015 the Committee against Torture urged Serbia to "continue and intensify its efforts to facilitate access to prompt and fair individualized asylum determination procedures in order to avoid the risk of refoulement" and "ensure that the asylum determination procedure provides for a substantive review of applications that respects the principle of non-refoulement, irrespective of whether the country of destination is considered safe".[20] It is also the official position of UNHCR that Serbia is not safe for asylum seekers and it recommends that asylum seekers should not be returned there.[21] The European Commission, in its progress report on Serbia in 2014, also pointed out the absence of effective access to the asylum procedure in Serbia and highlighted the need for a comprehensive reform of the asylum system.[22]

3.8 In Hungary, the author's asylum application was not examined on the merits because the authorities did not go beyond an assessment of the mere existence of Serbian international obligations and legislative provisions and did not check the actual practice in Serbia. That is not in line with the jurisprudence of the European Court, which noted in

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or at the nearest police station. Only with a certificate of registration can he or she be accepted into a reception centre and get material assistance, such as food and medical care (articles 39 and 40 of the Law on Asylum).

[16] See Amnesty International, "Europe's borderlands: violations against refugees and migrants in Macedonia, Serbia and Hungary", p. 43, and Médecins Sans Frontières, Serbia: Asylum seekers and migrants left in cold, 19 February 2015.

[17] See Human Rights Watch, "Serbia: police abusing migrants, asylum seekers: beaten, extorted, shoved back across the border" and Amnesty International, "Europe's borderlands: violations against refugees and migrants in Macedonia, Serbia and Hungary", p. 32.

[18] Ibid. Also see Human Rights Watch, Serbia: Police Abusing Migrants.

[19] In its latest assessment of the former Yugoslav Republic of Macedonia, the Office of the United Nations High Commissioner for Refugees (UNHCR) concludes that, owing to persistent gaps relating to access to the territory, to the asylum procedure and in the quality of decision-making, the country cannot be considered a "safe third country". See UNHCR, "The former Yugoslav Republic of Macedonia as a country of asylum" (August 2015).

[20] See CAT/C/SRB/CO/2, paras. 14–15.

[21] See "UNHCR urges Europe to change course on refugee crisis", 16 September 2015. See also interview with the UNHCR Hungarian spokesperson, 20 September 2015, available at https://refugeecrisisinhungary.wordpress.com/2015/09/20/crisis-and-chaos/, and UNHCR, "Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016" (May 2016).

[22] See European Commission, "Serbia progress report", October 2014.

M.S.S. v. Belgium and Greece that the mere existence of "domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment".[23] The Hungarian authorities completely disregarded the fact that the author was a victim of trafficking who had suffered serious abuse in Serbia, that she had been held in captivity, forced into prostitution and raped several times until she was abandoned by her captors in the forest at the Hungarian border and that, therefore, she had had no chance to ask for asylum in Serbia even if she had wanted to. The Hungarian authorities clearly did not conduct a thorough and individualized assessment, taking into consideration the personal circumstances of the author and the general situation prevailing in the country of return in the light of the jurisprudence of the European Court.[24]

3.9 The author is particularly vulnerable to inhuman and degrading treatment in Serbia as she is a single woman, a victim of trafficking and has suffered related mental and psychological health problems. She suffers from post-traumatic stress disorder and major depressive disorder.[25] She was raped several times and deprived of her liberty while in Serbia, facts that amount to a violation of article 7 of the Covenant according to the Committee's general comment No. 20. None of those factors were taken into consideration during the asylum procedure carried out by the Office of Immigration and Nationality or by the Budapest Administrative and Labour Court.

3.10 Different reports also show that victims of human trafficking are not sufficiently protected in Serbia.[26] Those who have been rescued can be subject to a lengthy and insensitive procedure that may result in secondary traumatization. Victims' identities are often not effectively protected by the authorities, which may put them in danger. The efforts of the authorities to identify victims of trafficking among asylum seekers are not considered adequate[27] and victims of rape are in a very difficult situation in Serbia owing to fear of reprisals from attackers and of humiliation in court. There is low public awareness of sexual harassment, the Government has not enforced the law effectively and the number of complaints filed by women remains low.[28]

3.11 With regard to article 13 of the Covenant, the author was denied the opportunity to submit reasons against her expulsion and to be represented before the Budapest Administrative and Labour Court. Following her interview with the Office of Immigration and Nationality, the minutes were not read back to her in order to give her the possibility to correct any errors, nor did the Office of Immigration and Nationality take into account the report by the Hungarian Helsinki Committee in making their decision, including the fact that the author and her sister had been victims of human trafficking and sexual abuse in Serbia. Although the author lodged an appeal within the legal seven-day period, the court decided her case without considering her submission owing to the delay of one week in the

[23] See *M.S.S. v. Belgium and Greece*, para. 353.

[24] The author also refers to the judgments of the European Court in *Neulinger and Shruk v. Switzerland*, Case No. 41615/07, 6 July 2010; *Sharifi and others v. Italy and Greece*, Case No. 16643/09, 21 October 2014; and *Tarakhel v. Switzerland*, Case No. 29217/12, 4 November 2014.

[25] The author is supported by the Cordelia Foundation, a Hungarian non-governmental organization working for the rehabilitation of victims of torture. The Cordelia Foundation issued a medical opinion on 28 April 2016, following her allegations of torture — sexual abuse and rape — in which it stated that the author was suffering from post-traumatic stress disorder and major depressive disorder. She still needed medication and psychotherapy and the Foundation further stated that: "the symptoms of the applicant and the result of the medical evaluation are in line with each other. The claimed forms of torture and traumas are normally those which may be experienced in the case of those arriving from the region of the applicant. I hereby state that, based on her symptoms, the applicant was a victim of seriously inhuman treatment, traumatisation and still continues to suffer from these experiences."

[26] See Group of Experts on Action against Trafficking in Human Beings, "Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Serbia", (January 2014), para. 235.

[27] See United States Department of State, *Trafficking in Persons Report. July 2015*, available from www.state.gov/documents/organization/245365.pdf.

[28] See United States Department of State, "Country reports on human rights practices for 2015", available from https://2009-2017.state.gov/humanrightsreports/.

Office of Immigration and Nationality transmitting it to the court. She further notes that in the case of her sister, who received a negative decision on the same day and followed the same procedure, an appeal is still pending, as the Budapest Administrative and Labour Court did not take a decision within the eight days allowed and has therefore been able to take counsel's submission and the supporting documents into account.

3.12 The author has also been deprived of the ability to express her views on expulsion because the court denied her request for a personal hearing. That goes against the Committee's Views in *Ahani v. Canada*. In that case, the failure of the State party to provide the author with procedural protection on the basis that he had not demonstrated a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal and to have his submissions reviewed by a competent authority.[29]

3.13 As regards the alleged violation of article 2 (3) (a), read together with article 7 of the Covenant, the judicial review of the Budapest Administrative and Labour Court was not an effective remedy. The court did not consider the opinion of various international bodies, including UNHCR, regarding practical deficiencies in the Serbian asylum procedure, but instead relied on the existence of an asylum law to guarantee protection and on the fact that Serbia had ratified relevant conventions. Further, the Office of Immigration and Nationality did not forward counsel's submission to the court without delay and the court did not have time to consider the submission within the eight-day deadline. The eight-day deadline for the court to deliver a decision is in general insufficient for "a full and *ex-nunc* examination of both facts and points of law" as prescribed by European Union law.[30] Five or six working days are not enough for a judge to obtain crucial evidence, such as digested and translated country information or a medical/psychological expert opinion, or to arrange a personal hearing with a suitable interpreter.

3.14 The remedy is also ineffective because a personal hearing by the judge is not mandatory.[31] That is especially problematic because a hearing is a crucial safeguard in the judicial review procedure, when the first instance judge delivers a final, non-appealable decision. The unreasonably short time limit and the lack of a personal hearing can reduce the judicial review to a mere formality, in which the judge has no other information than the documents in the case file provided by the Office of Immigration and Nationality. Thus, in the light of the potentially irreversible harm that may result — directly or indirectly — from returning an applicant to a third country, the author's case was not subject to "rigorous scrutiny", in line with the principle established by the jurisprudence of the European Court.[32] By not considering the potential risk for the author of being subjected to inhuman and degrading treatment if returned to Serbia and the risk of further chain refoulement, the judicial review procedure before the Budapest Administrative and Labour Court is in breach of article 2 (3) (a) read in conjunction with article 7 of the Covenant.

State party's observations on admissibility and the merits

4.1 On 21 December 2016, the State party submitted its observations on admissibility and the merits of the communication. It claims that the minutes of the interview with the Office of Immigration and Nationality were signed by the author and, according to the minutes, they were read back to her, as demonstrated by the signatures of both the author and the interpreter. Moreover, during the hearing, the author was specifically asked if she had understood the interpreter and she replied in the affirmative, declaring that she had not faced communication problems. The burden of proof therefore lies with the author to rebut the documentary evidence of the case file in the administrative proceedings.

4.2 Regarding the decision of the Office of Immigration and Nationality of 15 April 2016, the author's submission concerning the minutes only arrived at the Office after the decision of the authority had already been delivered. The asylum authority was therefore

[29] *Ahani v. Canada* (CCPR/C/80/D/1051/2002), para. 10.8.

[30] See article 46 (3) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

[31] See section 53 (4) of the Asylum Act.

[32] See European Court of Human Rights, *Chahal v. UK*, Case No. 22414/93, Judgment, 15 November 1996.

not in a position to consider it. Nevertheless, the documents were attached to the case file for consideration by the competent court when it was forwarded for judicial review by the refugee authority.

4.3 Section 93 (2) the Asylum Act provides that the Government shall be entitled to define the list of safe countries of origin and safe third countries in a governmental decree. According to section 2 of government decree No. 191/2015 (VII.21), candidate countries for European Union accession, including Serbia, belong to the group of safe third countries.

4.4 Regarding the author's appeal against the decision of the Office of Immigration and Nationality, the request for appeal was received by the asylum authority on 25 April 2016. Based on section 53 (3) of the Asylum Act, the Office of Immigration and Nationality immediately forwarded the request and the counter motion to the competent court for judicial review. The authority sent the case to the court on 28 April 2016. The preliminary submission of the author's legal representative was received by the Office of Immigration and Nationality on 29 April 2016 and, upon registration, was handed over to the administrator of the case on the same day. Owing to the short deadline available for the court proceedings, the document was registered and filed with the court on the next working day. That means that on 2 May 2016, the Office of Immigration and Nationality had forwarded the documents to the court. Given the volume of the preliminary documentation, the asylum authority forwarded the asylum application to the municipal administrative court and the labour court by post. Based on section 53 (3) of the Asylum Act, any requests for review must be filed with the asylum authorities, whereas supplementary information to an application shall be submitted directly to the court in accordance with section 93 (2) of the Civil Procedure Code. The failure of the author's legal representative may therefore not be attributed to the Office of Immigration and Nationality, as alleged by the author.

4.5 Referring to the final court decision, the alleged atrocities committed by human traffickers and suffered by the author are not relevant as to the decision taken by the asylum authority. The sole fact that the author did not turn to the Serbian authorities concerning the alleged criminal offences or that she failed to file a request for asylum does not mean that the Serbian authorities could not have provided her with protection against her persecution or the serious harm she had allegedly suffered.

4.6 As to the author's reference to the case of *Budina v. Russia* decided by the European Court, according to which any indifference or inaction on the part of the authorities may constitute inhuman and degrading treatment, those findings cannot be applied in the present communication, because the asylum authority had indeed conducted the proceedings and delivered its decision on the inadmissibility of the application on legal grounds.

4.7 With respect to the author's statement that her asylum application was not examined on the merits, the authority was not in a position to examine the merits as to whether the author had indeed been exposed to persecution or serious harm in her country of origin. At that stage of the procedure, the authority could only determine which member State was responsible for the examination of the asylum request.

4.8 Serbia is governed by the rule of law, has ratified several human rights treaties and has an asylum law based on the principle of non-refoulement. That act ensures that persons in situations similar or identical to the author's case will be recognized as refugees or receive temporary protection in Serbia. The author therefore had a real opportunity to submit a request for international protection in Serbia. However, she did not avail herself of that opportunity and still refuses to do so. Besides, according to the information available on Serbia, the institutional framework for the submission and consideration of asylum requests is assured. In addition, Serbia is a candidate country for European Union accession and in that context, it has officially stated that it accepts freedom, security and justice as part of the *acquis* of the European Union (as of 1 January 2016), including the part that guarantees high standards of international protection and constitutes the elements of the common European asylum system.

4.9 In relation to the author's reference to the official position of UNHCR and the European Commission in respect of Serbia, Opinion No. 1/2016 (21 March) of the Curia (the Supreme Court of Hungary) proclaims that the relevant European Union laws and their

modifications on the regulation of member States' legislative activity allow member States to decide on the list of safe third countries on an individual basis. According to section 3 (2) of government decree No. 191/2015 (VII.21), when a person requesting asylum, prior to arrival to the territory of Hungary, stayed or transited through a country which is on the list of the European Union of safe third countries, he or she may prove during the asylum procedure that he or she did not have any access to effective protection in that country, in line with section 2 (i) of the Asylum Act. In accordance with section 51 (11) of the Act, a person making such a statement may provide justification, immediately or not later than three days later, as to why a given country will not qualify as a safe country of origin or third country in the case in question.

4.10 During the asylum hearing, the author was informed that Serbia was considered a safe third country and that she was obliged to rebut that presumption within three days, as provided in the above-mentioned law. The author confirmed her understanding of the information given, but failed to make any statements in that regard, except for the untimely submission during the judicial proceedings. When deciding on the issue of inadmissibility, the authority may only consider whether the applicant resided in or travelled through the territory of a safe third country and whether he or she had a real chance of requesting effective protection in that specific country. Additionally, having regard to article 3.1 (b) of the readmission agreement between the European Community and Serbia, promulgated in decision No. 2007/819/EC of the Council of the European Union, the Hungarian asylum authority had no reason to assume that Serbia, as a candidate country for European Union accession, would not respect its obligations under an international treaty concluded with the European Union. Consequently, it has reasonably been established that in the author's case, Serbia qualifies as a safe third country which could approve her asylum request.

4.11 With respect to the allegations of chain deportation to Macedonia and Greece, significant developments have taken place in the Greek asylum system. Over the last five years, Greece has received significant amounts of financial and technical assistance from European Union funds for the development of its asylum system and for processing the backlog of cases.[33] Since October 2015, within the framework of the Greek "hotspot operation plan", the European Asylum Support Office has also deployed 136 experts from member States to Greece in order to support the Greek refugee service in the following areas: flow of information, registration, processing Dublin cases and in the area of identification of false documents. Recently, the European Union has allocated considerable amounts for improving the situation of asylum seekers in Greece, and there have been serious developments, in particular in housing conditions and capacities. Greece has also implemented the European Union *acquis*, which contains the elements of the common European asylum system, it has designed an asylum system (refugee service) and established an independent judicial review body.

4.12 As to the author's vulnerability, the author did not reveal that she was in need of assistance because of any physical or mental problems, either to the administrators of the asylum authority or to the social workers at the reception centre, even though she had the opportunity to do so. Furthermore, the author's statements to the Office of Immigration and Nationality contained inconsistencies, thereby casting doubt on her credibility.

4.13 Regarding the alleged violation of articles 13 and 2 (3) (a) of the Covenant, the author failed to avail herself of the opportunity to rebut the presumption of Serbia qualifying as safe third country, despite the fact that she had been informed about that legal requirement in a timely manner. Such statements were only revealed during the court proceedings. The Office of Immigration and Nationality has fulfilled its obligation to provide effective remedies, given that both the author's request for judicial review and her subsequent submissions were forwarded to the court on the first working day following receipt of the document.

4.14 Regarding the author's claim that the judge decided her case without taking into account her counsel's submissions, the court revised the decision of the asylum authority in

[33] The State party refers to the support allocated by the Asylum, Migration and Integration Fund, as well as emergency aid.

a so-called non-litigation procedure.[34] It therefore established the facts based on the content of the case file in the administrative proceedings.[35] Under section 53 (4) of the Asylum Act, the court shall deliver its decision on requests for judicial review based on the available documents in a non-litigation procedure and within eight days from receipt of the request for an appeal. The review of the court shall cover all the facts and legal aspects as known on the date of the decision. Personal hearings may take place, if deemed necessary, even without the request of the person concerned. In such cases, the decision as to whether a personal hearing should take place falls within the discretion of the judge. Even though the court did not deem it necessary to hear the author, the decision reached in the judicial review proceedings was based on the author's personal testimony submitted in the asylum procedure.

4.15 In the interest of providing protection for asylum seekers and to ensure respect for the principle of non-refoulement, section 51/A of the Asylum Act provides that if the safe country of origin or the safe third country refuse to take back the applicant, the asylum authority withdraws its decision and continues the procedure.

4.16 For all these reasons, the State party considers that the articles of the Covenant invoked by the author in the present communication have not been violated.

Author's comments on the State party's observations on admissibility and the merits

5.1 In her comments of 23 March 2017, the author maintains that the minutes of her interview with the Office of Immigration and Nationality were not read back to her and she was not informed of the statement to the effect that they had been read back. She signed the minutes without being aware of their exact content.

5.2 Regarding the State party's argument that she did not report any communication problems with the interpreter during the interview, mistakes in the minutes, even if unintended, are not always connected to miscommunication with the interpreter, but may occur during the translation of the asylum seeker's statements, or when the case officer is typing up the translation. That is the reason for the existence of a procedural safeguard in article 17 (3) of the recast so-called asylum procedures Directive of the European Union, according to which member States shall ensure that the applicant has the opportunity to make comments and/or provide clarification orally and/or in writing with regard to any mistranslations or misconceptions appearing in the report or in the transcript, at the end of the personal interview or within a specified time limit before the determining authority takes a decision.[36]

5.3 The author submitted the corrections to the minutes to the Office of Immigration and Nationality office in the Bicske refugee camp on 13 April 2016, that is only two days after the interview. It is thus not her fault that the Office of Immigration and Nationality department in Budapest, which delivered the decision on 15 April 2016, did not receive the document on time. Minutes have the status of documentary evidence, and should have been taken into account by the Office of Immigration and Nationality.

5.4 Serbia cannot be considered as a safe third country for her owing to the violations she faced there. It is not enough to point to the existence of an asylum law, relevant ratified treaties and candidate status for European Union accession in order for a country to be considered safe for an asylum seeker, but "the general situation in another country, including the ability of its judicial authorities to provide protection, has to be established *proprio motu* by the competent domestic immigration authorities",[37] especially "when

[34] In accordance with sections 53 (4) and 65 (7) of the Asylum Act and Act III of 1952 on the Code of Civil Procedure, which were applied under section 4 of Act XVII of 2005 on Non-Contentious Administrative Proceedings and under the amendment to the Code of Civil Procedure.

[35] According to section 1 (2) of the Act on Non-Contentious Administrative Proceedings, only documentary evidence shall serve as a basis for decisions in non-litigation administrative proceedings.

[36] Directive 2013/32/EU of the European Parliament and of the Council.

[37] European Court of Human Rights, *J.K. and Others v. Sweden*, Case No. 59166/12, Judgment, 23 August 2016, para. 98.

information about such a risk is freely ascertainable from a wide number of sources".[38] As to the State party's statement that once returned to Serbia she could complain to the authorities for the violations she had suffered there, according to the reports she brought to the attention of the Committee, victims of human trafficking and rape are not sufficiently protected in Serbia (see para. 3.10 above).

5.5 The author cites a judgment of the European Court of Human Rights in the case of *Ilias and Ahmed v. Hungary*,[39] considering that the core problems in her case are identical to the deficiencies revealed by the European Court. The Court found that the applicants' expulsion to Serbia exposed them to a real risk of being subjected to inhuman or degrading treatment, through a chain refoulement to Greece, where they would have faced inhuman and degrading conditions of reception.[40] The Court reiterated that according to the official position of UNHCR, Serbia was not a safe country for asylum seekers. The State party cannot simply rely on a safe third country list without taking into account the existing country information.

5.6 In theory, the State party has correctly applied the asylum procedure. However, various problems occurred in the author's case. Her appeal was decided less than 24 hours after the registration of her appeal by the court (see para. 2.8 above). Such a quick decision can be explained by the fact that the decision adopted in her case literally reproduces other decisions in cases where the Hungarian Helsinki Committee challenged the assumption that Serbia was a safe third country, only the author's name being changed. Also, even if her counsel sent his submission six days after the author received the negative decision, which was still within the seven-day deadline for appeal, the competent authority did not transmit his submission on time to the court and it therefore could not be taken into account in the judgment.

5.7 Regarding the State party's statement that she failed to rebut the presumption of Serbia being qualified as safe third country, although she was informed about the possibility of providing further evidence within a three-day deadline from the interview with the Office of Immigration and Nationality, she could not do so because she was held in captivity throughout her stay in Serbia and thus could not gather additional evidence. Her statements on her treatment in Serbia were sufficient evidence that Serbia was not a safe country for her,[41] but these facts were not even mentioned in the decision of the Office of Immigration and Nationality, nor were they considered by the court. The Hungarian authorities did not therefore examine with due diligence whether she indeed had a real chance to request effective protection.

5.8 As to the State party's allegation that she did not reveal her need for assistance based on physical and mental problems, her statement during the interview with the Office of Immigration and Nationality reflected the fact that she was a torture survivor who had undergone severe trauma, therefore falling within the category of especially vulnerable persons under section 2 (k) of the Asylum Act and article 21 of the Directive on reception

[38] European Court of Human Rights, *F.G. v. Sweden*, Case No. 43611/11, Judgment, 23 March 2016, para. 126.

[39] European Court of Human Rights, *Ilias and Ahmed v. Hungary*, Case No. 47287/15, Judgment, 14 March 2017. However, the case has been referred and is pending before the Grand Chamber.

[40] The author also refers to paragraph 120 of *Ilias and Ahmed v. Hungary*, according to which "[t]he Court observes that between January 2013 and July 2015 Serbia was not considered a safe third country by Hungary … This was so in accordance with reports of international institutions on the shortcomings of asylum proceedings in Serbia … However, the 2015 legislative change produced an abrupt change in the Hungarian stance on Serbia from the perspective of asylum proceedings … The altered position of the Hungarian authorities in this matter begs the question whether it reflects a substantive improvement of the guarantees afforded to asylum-seekers in Serbia. However, no convincing explanation or reasons have been adduced by the Government for this reversal of attitude, especially in light of the reservations of the UNHCR and respected international human rights organisations expressed as late as December 2016 …".

[41] The author refers to the European Court's judgment in *M.S.S. v. Belgium and Greece*, para. 366, according to which once an applicant presents an arguable claim that he or she might be at risk of inhuman and degrading treatment and when information about such a risk is freely ascertainable from a wide number of sources, the burden of proof shifts to the authorities.

conditions.[42] The author contends that it is the duty of the authorities to identify vulnerable asylum seekers,[43] not her obligation to inform the Office of Immigration and Nationality that she qualifies as a person in need of special treatment, especially when her vulnerability is so obvious.

5.9 The author also informs the Committee that on 5 December 2016, she was granted refugee status, which rebuts the State party's assumption that her statements lacked credibility.

5.10 The author contests the State party's allegation that the Office of Immigration and Nationality forwarded her subsequent submissions to the court on the first working day following receipt of the document. The Office of Immigration and Nationality forwarded the submission only on 2 May 2016, which was not the next working day after it had received her submission on 29 April 2016. Finally, the State party has not advanced any argument demonstrating that the judicial review of her case was indeed effective.

State party's additional observations

6.1 On 26 April 2017, the State party stated that a second asylum procedure had been initiated on 27 June 2016 at the author's request. During her hearing, she had confirmed what she had said during her first interview as regards her route to Hungary,[44] but she had elaborated more on the reasons for her fleeing and had made some corrections with regard to her prior statements. The court decided that the order of the asylum authority should be set aside and the case be remitted to the asylum authority to conduct a new procedure.[45] It further considered that the asylum authority had infringed section 64 (4) of the Asylum Law, which states that on assessment of whether the applicant's fear of persecution is well-founded, it is of no relevance whether the applicant possesses racial, religious or political characteristics or a national affiliation that attracts persecution, provided that such a characteristic is attributed to the applicant by the persecutor. Thus, on 1 December 2016, a third asylum proceeding started ex officio on the basis of the above-mentioned court decision, as a result of which the author was granted asylum.

6.2 The author cannot therefore now qualify as a victim of the alleged infringement of her rights under articles 7 and 13 of the Covenant, as she is no longer at risk of being expelled to Serbia. In view thereof, it requests the Committee to reject the complaint as inadmissible.

Additional comments from the author

7.1 On 5 June 2017, the author insisted that it was not true that she had applied for asylum in Serbia, as the State party had declared. During her stay in Serbia, she was kept in captivity by human traffickers and did not have any contact with the Serbian authorities.

7.2 The author was granted refugee status only after she herself had submitted a second asylum application. Her application was finally declared admissible and examined on the merits. This was made possible only thanks to the interim measures ordered by the Committee, but did not result from any initiative by the authorities of the State party.

7.3 The fact that she is no longer at risk of being deported to Serbia does not in itself mean that there was no violation of the positive obligation of States to comply with article 7, read in conjunction with article 2 (3) (a) of the Covenant. According to the case law of the European Court, "in the domain of extradition and removal of migrants, eventual loss of victim status under Article 3 of the Convention cannot automatically and retrospectively dispense the State from its obligations under Article 13, in particular where it can be demonstrated that an applicant had an 'arguable' claim under Article 3 at a time he or she

[42] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2014 laying down standards for the reception of applicants for international protection (recast).

[43] She invokes article 22 of the recast Directive 2013/33/EU on reception conditions, article 24 of the recast Directive 2013/32/EU on asylum procedures and section 3 (1) of government decree No. 301/2007 (XI.9) on the implementation of Act LXXX of 2007 on asylum.

[44] The State party also affirms that the author sought international protection in Serbia.

[45] The State party does not give any details as to the dates or authorities that issued those decisions.

was under an imminent threat of removal".[46] The author therefore maintains her claim that the Hungarian authorities failed to fulfil their obligation to provide effective guarantees to protect her against arbitrary removal to Serbia resulting in a potential violation of article 7, read in conjunction with article 2 (3) (a) of the Covenant. Her complaint essentially concerns the shortcomings and serious procedural deficiencies of the administrative and judicial procedure leading to the final and enforceable decision on her return to Serbia.

7.4 Finally, the author maintains her complaint under article 13 of the Covenant, reiterating that her right to submit reasons against her expulsion and her right to be represented were breached during the asylum procedure. The fact that she was not in the end returned to Serbia has no bearing on the breach of this concrete right.

State party's additional observations

8.1 On 7 August 2017, the State party submitted additional observations. It reiterates its arguments and contests the author's statement that the positive evaluation of her second asylum application was the result of the interim measures ordered by the Committee. The authorities examined once more the events that took place in Serbia, despite some inconsistencies, and considered that owing to the humanitarian and human rights aspects of the case, it would not have been appropriate to have the author's case suspended, as requested by her legal representative, until a final decision was taken by the Committee. It was therefore in the author's best interest to reverse the previous decision, resume the procedure and obtain a new final decision.

8.2 The decision of inadmissibility in the first set of asylum proceedings was delivered on the basis of all the information available, without any procedural errors or violations of rights and in compliance with legal requirements, a fact that has also been confirmed by the competent court which carried out the review procedure.

Additional comments from the author

9.1 On 29 August 2017, the author reiterated her previous submissions and welcomed the State party's decision to re-examine her case following the interim measures granted by the Committee, although only after she had introduced her second asylum request on 27 June 2016. She was not invited to make a second request for asylum by the Office of Immigration and Nationality, hence she claims that the risk of exposure to inhuman and degrading treatment has not been remedied by the Office of Immigration and Nationality, in breach of article 2 (3) (a) of the Covenant. Therefore, the only reason for having her second application examined on the merits were the interim measures ordered by the Committee, not the actions of the Hungarian authorities.

9.2 The fact that she was not in the end returned to Serbia has no bearing on the breach of her right to submit reasons against her expulsion and to be represented before the competent authority, in violation of article 13 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

10.2 The Committee has ascertained, as required by article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

10.3 The Committee notes the author's statement that she has exhausted all effective domestic remedies available to her. In the absence of any objection by the State party in

[46] See European Court of Human Rights, *Kebe and others v. Ukraine*, Case No. 12552/12, Judgment, 12 January 2017, para. 89.

that connection, the Committee considers that it is not precluded from examining the communication under article 5 (2) (b) of the Optional Protocol.

10.4 The Committee notes that the author's second application for asylum was accepted and that on 5 December 2016 she was granted refugee status in Hungary. It also notes the State party's argument that the communication should therefore be declared inadmissible.

10.5 The Committee further notes the author's argument that despite the fact that she is no longer at risk of being deported to Serbia, she maintains her complaint under article 7, read alone and in conjunction with article 2 (3), and article 13 of the Covenant, regarding the alleged shortcomings and serious deficiencies that characterized the examination of her first application for asylum, which led to an enforceable decision to return her to Serbia.

10.6 The Committee takes due note of the author's allegations and highlights its concern as to the way the procedure was carried out and its direct consequences for the author, both in terms of her legal status and her personal and health conditions, from her arrival until she was granted refugee status in Hungary. The Committee also notes the favourable decision adopted on 5 December 2016 whereby the author was granted refugee status and was thus no longer at risk of removal. In view thereof, the Committee considers that the issues raised by the author concerning the alleged violations of article 7, read alone and in conjunction with article 2 (3), and of article 13 of the Covenant, through the rejection of her asylum application, have become moot in relation to article 1 of the Optional Protocol. Accordingly, in view of the circumstances of the case, those particular issues need not be further addressed in the context of the communication under review.

11. The Committee therefore decides that:

(a) The communication is inadmissible under article 1 of the Optional Protocol;

(b) The decision shall be transmitted to the State party and to the author.